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84-1130

No. A-482

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

PAUL DEMPSTER AND THE
SAILORS' UNION OF THE PACIFIC,
Petitioners,

VS.

PETER TURNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS REPRESENTED

1. Whether or not the Ninth Circuit's decision is in conflict with this Court's opinion in *Calhoon v. Harvey*, 379 U.S. 134 (1974);

2. Whether or not the Ninth Circuit's opinion validly rejected the "majority rule" standard for a dues increase under the Labor Management Reporting and Disclosure Act;

3. Whether or not the District Court was empowered to grant classwide monetary relief without prior class certification pursuant to the provisions of FRCP 23(c).

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No. A-482

In the Supreme Court

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OCTOBER TERM, 1984

PAUL DEMPSTER AND THE
SAILORS' UNION OF THE PACIFIC,
Petitioners,

VS.

PETER TURNER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Paul Dempster and the Sailors' Union of the Pacific respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 1, 1984.

OPINIONS BELOW

The Court of Appeals initially entered an unpublished Memorandum Decision in this matter on August 7, 1984, and a timely Petition for Rehearing was filed by Petitioners on August 20, 1984, which Petition was denied by the Court of Appeals on October 1, 1984, and on which date the Court designated the Memorandum Decision an Opinion effective said date. This Opinion has not yet been reported.

The Ninth Circuit's Opinion of October 1, 1984, affirms, *inter alia*, the Order and Opinion of the United States District Court for the Northern District of California entered on August 18, 1983, and its Order of September 27, 1983, requiring repayment of membership dues. The District

Court's Opinion is reported at 569 F.Supp. 683 (N.B. Cal. 1983).

Copies of the foregoing decisions and orders are attached hereto as Appendix A.

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are primarily involved in the disposition of this matter:

Title 28 U.S.C. Rule 23(c)—Class Actions

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

Title 29 U.S.C. § 411 (a)(1), (3)(A)—Bill of Rights

"(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

• • •

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on Sep-

tember 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or . . . ."

Title 29 U.S.C. § 412—Civil action for infringement of rights;

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Title 29 U.S.C. § 482(c)—Declaration of Void Election

"(c) If, upon a preponderance of the evidence after a trial upon the merits, the court finds—

(1) that an election has not been held within the time prescribed by section 481 of this title, or

(2) that the violation of section 481 of this title may have affected the outcome of an election,

the court shall declare the election, if any, to be void and direct the conduct of a new election under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization . . ."

STATEMENT OF THE CASE

As reflected by the appended Opinions of the Ninth Circuit and the District Court herein, this petition arises from the conduct of a referendum vote by Petitioner Sailors' Union of the Pacific (SUP) during the period of April 15-June 15, 1981, to *inter alia*, raise the union's quarterly dues from $30.00 per quarter to $50.00 per quarter. Eligibility to vote in this election was limited to "full book" members who had attained this status by service at sea for a period of six years.

As reflected by the record below, a majority of the SUP's total membership voted for the dues increase, irrespective of the fact that only "full book" members were allowed to vote in the referendum. This conclusion is derived from the uncontested fact that at the time of the April-June 1981 Referendum, Petitioner SUP's membership rolls reflected 673 "permit" members who were excluded from participating in the challenged referendum. (CR 131-132). When this number is added to the negative votes lodged against the referendum dues increase, the total would be 1,036 "no" votes (673 "permits" + 363 "full book" members) as against 1,548 "yes" votes, resulting in a 59% approval of the dues increase on the assumption that the excluded "permit" membership would have voted against the dues increase.

Respondent Turner's complaint contested the dues increase and the rule that limited participation in the dues referendum to members with six years seatime.

The District Court's Decision of August 18, 1983, asserted jurisdiction under LMRDA Section 101(a)(1), 29 U.S.C. § 411(a)(1), and invalidated the dues referendum election on the basis that the six year seatime rule was unreasonable, without addressing the fact that a majority of the SUP's membership had approved the dues increase. Pursuant to this Decision, the District Court entered an Order on September 27, 1983, requiring class relief in the nature of a

return of all dues monies collected pursuant to the referendum. No class certification had previously been made by the District Court pursuant to FRCP 23(c).

In affirming the District Court's Decision and Order, the Ninth Circuit held that the District Court possessed subject matter jurisdiction pursuant to 29 U.S.C. § 411(a)(1) and specifically found that the fact that the majority of the SUP's membership had approved the dues increase was only relevant in a Title IV case, 29 U.S.C. § 481, and "has no application" in a Title I case, 29 U.S.C. § 411(a)(1). A-6.

In support of these conclusions, the Ninth Circuit further held that this Court's holding in *Calhoon v. Harvey*, 379 U.S. 134 (1964), was limited to Title IV actions and "does not, as the union contends, stand for the proposition that a member must allege the uneven application of union rules to state a claim under 29 U.S.C. § 411(a)(1)." A-4.

REASONS FOR GRANTING THE WRIT

I

THIS COURT'S OPINION IN CALHOON v. HARVEY REQUIRES A SHOWING OF DISCRIMINATORY TREATMENT AS A JURISDICTIONAL PREREQUISITE TO A TITLE I ACTION CONTRARY TO THE COURT OF APPEAL'S OPINION BELOW

A. This Court's Decision in Calhoon v. Harvey Prevents a Finding Herein of Unequal Treatment to Support Federal Court Jurisdiction under Title I of the LMRDA

Given that Respondent's Complaint seeks to protect and secure union members' rights "to vote, run for office and otherwise participate in the affairs of the SUP," subject matter jurisdiction under Title I of the LMRDA was denied the District Court under this Court's ruling in *Calhoon v. Harvey*, 379 U.S. 134, 85 S.Ct. 292, 13 L.Ed.2d 190 (1964).

In *Calhoon v. Harvey*, this Court was confronted with a substantially identical factual situation involving another maritime union, the National Marine Engineer's Beneficial Association, representing licensed engineers. The opinion aptly describes the case presented by the union members therein:

> The respondents, three members of District No. 1, National Marine Engineers' Beneficial Association, filed a complaint in Federal District Court against the union, its president and its secretary-treasurer, alleging that certain provisions of the union's bylaws and national constitution violated the Act in that they infringed "the right of members and defendant District No. 1, NMEBA, to nominate candidates in elections of defendant, which right is guaranteed to each member of defendant, and to each member of defendant, and to each plaintiff, by Section 101(a)(1) of the LMRDA. . . ." *It was alleged that § 102 of Title I of the Act gave the District Court jurisdiction to adjudicate the controversy.* The union bylaws complained of deprived a member of the right to nominate anyone for office but himself. *The national constitution in turn provided that no member could be eligible for nomination or election to a full-time elective office unless he had been a member of the national union for five years and had served 180 days or more of seatime in each of two of the preceding three years on vessels covered by collective bargaining agreements with the national or its subsidiary bodies.* On the basis of these allegations respondents asked that the union be enjoined from preparing for or conducting any election until it revised its system of elections . . ." (Emphasis supplied.) *Ibid.* at 135-136.

This Court went on to discuss the jurisdictional parameters of Title I finding that:

All that § 101(a)(1) guarantees is that:
"every *member* of a labor organization shall have equal rights and privileges . . . to nominate candidates, to vote in elections or *referendums* of the labor organization . . . and to *participate in the deliberations and voting* . . . subject to reasonable rules and regulations in such organization's constitution and bylaws."

Plainly, this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations" by the union. *The complaining union members here have not been discriminated against in any way and have been denied no privilege or right to vote or nominate which the union has granted to others.* They have indeed taken full advantage of the uniform rule limiting nominations by nominating themselves for office. *It is true that they were denied their request to be candidates, but that denial was not a discrimination against their right to nominate, since the same qualifications were required equally of all members. Whether the eligibility requirements set by the union's constitution and bylaws were reasonable and valid is a question separate and distinct from whether the right to nominate on an equal basis given by § 101(a)(1) was violated.* (Emphasis supplied.)

• • •

Without setting out the lengthy legislative history which preceded the passage of this measure, it is sufficient to say that we are satisfied that the act itself shows clearly by its structure and language that the disputes here, basically relating as they do

> to eligibility of candidates for office, *fall squarely within Title IV of the Act* and are to be resolved by the administrative and judicial procedures set out in that Title.

Ibid at 138-140.

Indeed, prior to the entry of its Opinion in the instant case, the Ninth Circuit's prior decisions likewise required that for a Title I action there must be a showing of discriminatory treatment, the denial of a privilege or right granted to other similarly situated members. See: *Canez v. Guerrero*, 707 F.2d 443, 445 (9th Cir. Ariz. 1983); *Rollison v. Hotel, Motel, Restaurant, Etc.*, 677 F.2d 741, 745 (9th Cir. Cal. 1982); *Kapua v. Yamomoto*, 622 F.2d 449, 453 (9th Cir. Cal. 1980); *Parish v. Legion*, 450 F.2d 821, 838 (9th Cir. Cal. 1971); also: *O'Doherty v. Brotherhood of Railway, Airline and Steamship Clerks*, 618 F.2d 484, 486 (8th Cir. Neb. 1980) ["the critical question is whether or not a union member is discriminated against in one of the rights guaranteed by Title I." *Ibid.* at 486 citing *McNail v. Amalgamated Meat Cutters*, 549 F.2d 540 (8th Cir. Neb. 1977)]; *Depew v. Edmiston*, 386 F.2d 710, 714-715 (3rd Cir. Pa. 1967).

In this instant case there is no dispute that "the same (six year seatime) qualification was required equally of all members" *Calhoon, supra* at pg. 15. Indeed, the District Court found that the SUP's division of voting rights between the members was not discriminatory A-18, 19. Accordingly, to the extent that the Ninth Circuit found that: (1) *Calhoon* does not, as the union contends, stand for the proposition that a member must allege the uneven application of union rules to state a claim under 29 U.S.C. § 411(a)(1);" and (2) that *Calhoon* only "concerned candidate eligibility qualifications," a subject governed by Title IV [A-45], the Court of Appeals decision is in conflict with *Calhoon*. And, for this reason, certiorari should issue to correct the Opinion below.

B. Whether the SUP's Six Year Seatime Rule Was Reasonable Is "A Question Separate and Distinct" from Whether a Right under Title I of the LMRDA Was Violated.

While the Ninth Circuit's Opinion assumed there was no requirement to show discriminatory or unequal treatment in the application of the SUP's six year seatime rule, this void cannot be filled by a finding that the six year rule is unreasonable as is implied by the Ninth Circuit's Opinion and specifically stated in the District Court's. A-19. This argument was made and rejected by this Court in *Calhoon*.

Plaintiffs in *Calhoon* argued that since they had not met the five year membership—three year seatime rule prescribed by the Marine Engineers "for election to a full time office," they were being discriminated against. *Calhoon, supra at* pg. 136. But this Court countered by observing that "whether the eligibility requirements set by the union's constitution and bylaws were reasonable is a question separate and distinct from whether the right to (vote) on an equal basis given by Section 101(a)(1) was violated." *Calhoon, supra* at pg. 13. Thus, if "the same qualifications are required equally of all members," then, this Court held, questions of the reasonableness of eligibility requirements, "basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title." *Calhoon, supra* at pg. 141.

Petitioner SUP adopts this Court's argument in this respect and submits that the reasonableness of the six year seatime rule is irrelevant since the District Court found no inequality in "that the fact that the Sailors' Union of the Pacific divided the right to vote amongst its members does not . . . violate the equal rights provisions of Title I." A-19.

Petitioner also submits that to the extent that the eligibility rules for voting in referendum and candidate elections are one and the same under the SUP's constitution, given the absence of the discrimination required by *Calhoon,* the resolution of respondent's claim was properly dealt with in his subsequent action under Title IV. See: *Donovan v. Sailors' Union of the Pacific,* A484, herein.

II

THE SUP'S DUES INCREASE WAS PROPERLY ADOPTED BY A "MAJORITY VOTE" OF THE MEMBERSHIP WITHIN THE MEANING OF THE LMRDA

The controlling provisions of Title I, LMRDA Section 101(a)(3), 29 U.S.C. § 411(a)(3), provide in pertinent part that "the rates of dues and fees payable by members of any labor organization . . . shall not be increased . . . except . . . *by majority vote of the members* in good standing voting in a membership referendum conducted by secret ballot." (Emphasis supplied.)

Title IV, LMRDA Section 402(c)(2), 29 U.S.C. § 482 (c)(2), provides that "violations of the election provisions of the Act which occurred in the conduct of elections . . . are not grounds for setting aside an election unless they have *affected the outcome.*"[1] (Emphasis supplied.) 29 U.S.C. § 482(c)(2); 29 C.F.R. § 452. See: *Wirtz v. Hotel, Motel & Club Employees Union, Local 6,* 391 U.S. 492, 88 S.Ct. 1743; 201 L.Ed.2d 763 (1968); *Marshall v. Steelworkers, Local 12447,* 591 F.2d 199, (3rd Cir. Pa. 1978); *Thompson v. Union of Flight Attendants,* 109 LRRM 2870 (C.D. 1982).

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[1]A like standard is employed by the National Labor Relations Board pursuant to election challenges under the Labor Management Relations Act, 29 U.S.C., §§ 151, *et seq.,* whereunder election results will not be set aside unless "the challenged ballots are sufficient in number to affect the results of the election." 29 C.F.R. § 102.69(b).

While the District Court's Opinion failed to address the fact that the dues increase was approved by a majority of the SUP's membership, the Court of Appeals found that this fact was irrelevant since the language of Section 402, above quoted, justifying the invalidation of an election only where the "violations . . . affected the outcome," was not applicable to elections under Section 101, the Court of Appeals stating that "29 U.S.C. § 482(c) applies only when a party has challenged an election under 29 U.S.C. § 481," citing *Donovan v. Local Union 70, International Brotherhood of Teamsters*, 661 F.2d 1199, 1202 (9th Cir. Cal. 1981).

Notwithstanding, since the dues increase was approved by a "majority vote" under Section 401, Petitioner SUP submits that the increase cannot be invalidated, irrespective of the eligibility rules underlying the referendum, since the question of the reasonableness of the eligibility rule "is a question separate and distinct" from whether the majority of the SUP's membership approved the dues increase. *Calhoon v. Harvey, supra* at 136. Put more plainly, it's the difference between merely amending the union's constitution, on the one hand, and paying back several hundred thousand dollars in back dues as well as amending the union's constitution, on the other.

This dilemma is avoidable by adopting for purposes of a Title I election the same guideline that exists under Title IV and the National Labor Relations Act, viz. that only violations that "affected the outcome" of the challenged election will serve to overturn the election. And, this approach is not diluted by the Court of Appeals' citation to its prior decision in *Donovan v. Local 70, International Brotherhood of Teamsters, supra*, since the decision does not support its assertion that the "outcome" standard of Title IV is inapplicable to Title I elections. It merely confirms that such is the standard under Title IV.

As Petitioners argued to the Court of Appeals, the only case to deal with the issue found that the standard applied equally under both Titles. In *Wingate v. Teamsters, Local 107*, 51 CCH Labor Cases § 19,643 (D.C. Del. 1964), the District Court in a Title I referendum election found that "since petitioners have failed to establish any violation of their equal rights and privileges *such as would affect the outcome of the referendum* here considered, it is the Court's conclusion that judgment must be entered for defendant and against petitioners." (Emphasis supplied.) *Ibid.* at pg. 33, 574.

Petitioner submits that the *Wingate* rule is the appropriate approach since it responds to the "need for uniformity" of procedures in the field of labor relations by adopting a federal standard to apply in all election challenge cases. See: *United Parcel Service Inc. v. Mitchell*, 451 U.S. 56, 70-71 (1981), as quoted in *Del Costello v. Teamsters*, ——— U.S. ———, 103 S.Ct. 2281, 2294; 76 L.Ed.2d 476 (1983); also: *Garner v. Teamsters*, 346 U.S. 485, 490 (1953) [need for "centralized administration of specially designed procedures" reflected in federal labor laws].

At all events, despite petitioner's exclusion of members with less than six years seatime from voting in the dues referendum, a "majority vote" was secured for the approval of the increase consistent with 29 U.S.C. § 411(a)(3); and whether this majority approval should be overturned, without a showing that the eligibility rules "affected the outcome," presents an important question of law justifying the grant of a writ of certiorari herein.

III

THE DISTRICT COURT'S FAILURE TO CERTIFY THE ACTION BELOW FORECLOSED ENTRY OF ITS ORDER OF SEPTEMBER 27, 1983, GRANTING CLASS-WIDE RELIEF BY THE RETURN OF ALL DUES MONIES COLLECTED PURSUANT TO THE CHALLENGED REFERENDUM

By its amended Notice of Appeal of November 30, 1983, Petitioner SUP placed at issue the District Court's Order of September 27, 1983, requiring the repayment of all dues monies collected pursuant to the challenged 1981 referendum election. However, given the fact that the underlying action was not brought as a class action pursuant to the provisions of Title I of the LMRDA, the District Court was foreclosed from granting an "award of monetary relief to the hypothetical class" in the form of a total refund of dues to the SUP's membership. FRCP 23(c); *Landry v. Sabine Independent Seamen's Ass'n*, 623 F.2d 347, 350-351 (5th Cir. Tex. 1980) [certification a precondition to refund]; *Gravenstein v. Campion*, 540 F.Supp. 7, 11 (D.C. Alaska 1981) [Title I action requires class certification].

The appropriate relief forthcoming under the circumstances, therefore, should have been limited to a refund of the respondent Turner's dues. *Landry v. Sabine Independent Seamen's Ass'n, supra*, at pg. 351.

In raising this issue, petitioner is not unmindful that the issue was not raised before the District Court. However, it should be obvious that where, as herein, the issue is preempted by the filing of a cross-motion for summary judgment early on in the action, prior to the filing of a motion for certification under FRCP 23, the responsibility must fall upon the District Court to certify the action, if appropriate, prior to entry of class relief; or, alternatively, withhold a class remedy until the moving party seeks and is

granted such certification. Absent such action by a District Court, such orders must be deemed unenforceable without further action by the defendants. *Landry v. Sabine Independent Seamen's Ass'n, supra.*[2]

More to the point, to allow the Order of September 27, 1984, to stand without further comment by the Court of Appeals, or remand to the District Court for certification pursuant to the provisions of FRCP 23, denies Petitioner SUP its right to due process as a prerequisite to the deprivation of its dues funds. See: *In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088 (5th Cir. Fla. 1977); *In re Four Seasons Securities Laws Litigation,* 502 F.2d 834 (10th Cir. Okl. 1974), *cert. denied,* 419 U.S. 1034.

Since the foregoing, therefore, presents both a question with due process ramifications as well as an important question of procedure under FRCP 23, a grant of certiorari to review the judgment below is justified.

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[2]The absence of a class certification in the instant matter was raised in the Court of Appeals by Petitioner's Motion for Stay dated November 5, 1984.

CONCLUSION

For the foregoing reasons, therefore, a writ of certiorari should issue to review the opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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Pacific

(Appendices follow)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 83-2407, 84-1703

DC No. CV 82-1117-RPA
Northern California

Peter Turner,
Plaintiff-Appellee,

vs.

Paul Dempster and Sailor's Union of the Pacific,
Defendants-Appellants.

[Filed Oct. 1, 1984]

ORDER

Before: HUG, TANG and FARRIS, Circuit Judges.

The memorandum decision filed August 6, 1984 is hereby redesignated an opinion, authored by Judge Farris.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Peter Turner,
Plaintiff-Appellee,

vs.

Paul Dempster, President and individually, and Sailors' Union of the Pacific, an unincorporated association,
Defendants-Appellants.

CA No. 83-2407
DC No.
CV 82-1117-RPA

Peter Turner,
Plaintiff-Appellee,

vs.

Paul Dempster and Sailors' Union of the Pacific,
Defendants-Appellants.

CA No. 84-1703
DC No.
C-82-1117-RPA
(N. California)

[Filed Oct. 1, 1984]

ORDER

Before: HUG, TANG and FARRIS, Circuit Judges.

The petition for rehearing filed August 20, 1984 is denied.

Appendix C

United States Court of Appeals
For the Ninth Circuit

Peter Turner,
Plaintiff-Appellee,

vs.

Paul Dempster, President and individually, and Sailors' Union of the Pacific, an unincorporated association,
Defendants-Appellants.

CA No. 83-2407
DC No.
CV 82-1117-RPA

Peter Turner,
Plaintiff-Appellee,

vs.

Paul Dempster and Sailors' Union of the Pacific,
Defendants-Appellants.

CA No. 84-1703
DC No.
C-82-1117-RPA
(N. California)

[Filed Oct. 1, 1984]

OPINION

Appeal from the United States District Court
for the Northern District of California
Robert P. Aguilar, District Judge, Presiding
Argued and submitted June 14, 1984

Before: HUG, TANG and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

The union constitution provided that only "full book" members could vote on all union-related matters. Members attain full book status by working on a ship at sea for six years. Members who have not attained full book status may

exercise only limited rights within the union. In a 1981 constitutional referendum, full book members voted to raise quarterly dues from $30 to $50 and to reduce the time required to attain full book status from six years service to three years membership. Turner contested the dues increase and the rule which allowed only those members with six years experience to vote in the constitutional referendum. The district court held that the six-year requirement was unreasonable and invalidated the dues increase. *Turner v. Dempster*, 569 F.Supp. 683 (N.D. Cal. 1983). We affirm.

A preliminary issue is whether Turner has stated a claim under § 101(a)(1) of the Labor-Management Reporting and Disclosure Act of 1959. 29 U.S.C. § 411(a)(1). This section provides that every member of a labor organization "shall have equal rights and privileges within such organization . . . to vote in elections or referendums of the labor organization. . . ." A complaining union member states a claim if the member asserts a denial of a voting right given to another member or class of members. *Stelling v. International Brotherhood of Electrical Workers Local Union No. 1547*, 587 F.2d 1379, 1385 (9th Cir. 1978), *cert. denied*, 442 U.S. 944 (1979); *American Postal Workers Union Headquarters Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1101 (D.C. Cir. 1981). Turner meets the test.

The union's reliance on *Calhoon v. Harvey*, 379 U.S. 134 (1964), is misplaced. The Court there said that the denial of the plaintiffs' request to be candidates "was not a discrimination against their right to nominate, since the same [candidate eligibility] qualifications were required equally of all members." *Id.* at 139.

Calhoon does not, as the union contends, stand for the proposition that a member must allege the uneven application of union rules to state a claim under 29 U.S.C.

§ 411(a)(1). *Calhoon* concerned candidate eligibility qualifications, a subject governed by Title IV. *See* 29 U.S.C. § 481. Turner is not challenging candidate eligibility qualifications or election procedures. He alleged a violation of his right to vote in referendums, which Title I alone governs. *See* 29 U.S.C. § 411(a)(1). To state a claim under Title I, Turner does not have to allege the uneven application of union rules. He has stated a claim by showing that he was denied the right to vote in referendums—a right guaranteed in Title I—which was conferred on another class of members. *See American Postal Workers*, 665 F.2d at 1100-01; *Parish v. Legion*, 450 F.2d 821, 828 (9th Cir. 1971).

The union, in a related argument, contends that Turner is seeking relief for Title IV claims and that the exclusive remedy of Title IV precludes relief under Title I, citing *Kahn v. Hotel & Restaurant Employees' & Bartenders International Union*, 469 F. Supp. 14 (N.D. Cal. 1977), *aff'd*, 597 F.2d 1317 (9th Cir. 1979). We reject the argument. The portion of the *Kahn* opinion relied upon by the union concerned the timing of an officer's election, which the court held must be brought under Title IV. Turner is not contesting an election of officers. He challenges the dues increase and the union rule prohibiting him from voting in referendums. Title IV has no language referring to elections, other than the election of officers. It does not relate to referendum elections. Title I governs these disputes, *see* 29 U.S.C. § 411(a)(1), (3); *Denov v. Chicago Federation of Musicians, Local 10-208*, 703 F.2d 1034, 1037 (7th Cir. 1983). Moreover, even though Turner's challenge to the voter eligibility requirements will affect future elections of officers, his Title I cause of action is not preempted by the existence of a future Title IV claim. *See Kupau v. Yamamoto*, 622 F.2d 449, 455 (9th Cir. 1980); *Depew v. Edmiston*, 386 F.2d 710 (3d Cir. 1967).

The district court held that the union rule which limited full book status to those members who had attained six years experience was unreasonable. The union does not contest the finding. Because there is no dispute on whether the six-year rule is unreasonable, we need not address Turner's argument that all restrictions on the right to vote, no matter how reasonable, violate 29 U.S.C. § 411 (a)(1).

The union, citing 29 U.S.C. § 482(c)(2), argues that the district court erred in failing to determine whether the violations of 29 U.S.C. § 411(a)(1) affected the outcome of the referendum. 29 U.S.C. § 482(c)(2) provides that a district court shall set aside an election if it finds "that the violation of section 481 . . . may have affected the outcome of an election." As this language demonstrates, 29 U.S.C. § 482(c) applies only when a party has challenged an election under 29 U.S.C. § 481. *See, e.g., Donovan v. Local Union 70, International Brotherhood of Teamsters,* 661 F.2d 1199, 1202 (9th Cir. 1981). It has no application in the present case where Turner challenges the adoption of the dues increase and the denial of his right to vote in the referendum, both of which are governed by 29 U.S.C. § 411(a). *See Connor v. Highway Truck Drivers and Helpers, Local 107,* 378 F. Supp. 1069, 1073-74 (E.D. Pa. 1974), *modified on other grounds,* 68 F.R.D. 370 (E.D. Pa. 1975).

The district court was not divested of jurisdiction to award attorney fees. *See Masalosalo v. Stonewall Insurance Co.,* 718 F.2d 955, 957 (9th Cir. 1983).

AFFIRMED.

Appendix D

United States District Court
Northern District of California

No. C-82-1117 RPA

Peter Turner
Plaintiff,

vs.

Paul Dempster, and Sailors' Union of the Pacific,
Defendants.

[Filed September 27, 1983]

ORDER

The above-captioned case came for a regularly scheduled hearing on September 15, 1983. The Court heard plaintiff's request for entry of declaratory judgment and injunction, and defendants' petition for reconsideration and request for additional findings. Having received, read, and considered these motions, the Court hereby enters the following order.

1. The Court declares that the voter eligibility rules which limited voting to members with six years actual sea time are unreasonable and violate 29 U.S.C. § 411(a)(1).

2. The Court further declares that the constitutional referendum which the union conducted in April-June 1981 is void because the referendum was conducted pursuant to voter eligibility rules that the Court has determined are in violation of 29 U.S.C. § 411(a)(1).

3. The Court finds that the entire referendum conducted in April-June 1981 was tainted by the use of eligibility rules that violate 29 U.S.C. § 411(a)(1).

4. Accordingly, the Court sets aside the dues increase that was enacted in that referendum.

5. The Court orders that defendant union remit to each of its members all dues collected in excess of the $30 per quarter dues rate that was in effect before the referendum of April-June 1981.

6. Finally, the Court orders that defendant Sailors' Union of the Pacific publish this Order in the next issue of the *West Coast Sailor*.

IT IS SO ORDERED.

DATED: September 27, 1983.

/s/ ROBERT P. AGUILAR
Robert P. Aguilar
United States District Judge

Appendix E

United States District Court
Northern District of California

No. C-82-1117 RPA

Peter Turner,
Plaintiff,

v.

Paul Dempster and Sailors' Union of the Pacific,
Defendant.

[Filed August 18, 1983]

OPINION AND ORDER

The Sailors' Union of the Pacific (SUP) is a labor organization that represents unlicensed seagoing personnel aboard vessels of shipping companies belonging to Pacific Maritime Association and other independent operators. SUP contracts to supply qualified seamen to meet the manning requirements of the operators' vessels. The seamen are dispatched to various vessels based upon seniority and a rating priority determined by length of service and possession of the required Coast Guard rating certificates prescribed by various regulations of the Department of Transportation.

Pursuant to the SUP constitution, there are three classifications of union members. Prior to the 1981 amendments, which are the subject of this lawsuit, the union constitution restricted "Class A" or "full book" membership to individuals who had served six qualifying years of employment, actually working on the deck of a ship at sea. Because employment often lasts for only months at a time, it frequently takes longer than six calendar

years to satisfy the six year requirement. Only full book members are permitted to run for union office and vote on all union related matters.

"Permit members" are individuals who have paid dues for three years or more, but still have not satisfied the six year "on deck" work experience requirement necessary to attain full book member status. Permit members may vote in elections and hold office on only a limited basis.[1]

"Probationary members" are individuals who have paid an initiation fee but have paid dues for less than twelve months. Upon completion of probationary status and taking of the union's oath of obligation, a worker is admitted to full membership. However, it is not until he has paid dues for another two years and otherwise complied with the union's rules so as to keep in good standing, that he gains the political rights accorded to permit members.

In 1979, the U.S. Department of Labor notified defendant Paul Dempster, President and Secretary Treasurer of SUP, that the Department considered unreasonable and unlawful the union's six year requirement for full book status. In view of the Department's authority to go to Court to have unions elections set aside, *see* 29 U.S.C. §§ 483 *et seq.*, SUP and the Department attempted to reach a compromise resolution of the dispute.

Ultimately, Dempster decided to propose a constitutional amendment that would reduce from six years to three years the service time required to achieve full book status.

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[1]For example, permit members are precluded from voting on such matters as disciplinary recommendations of a trial committee, restoration of membership, filling vacancies in office, and assessments. Further, permit members are not allowed to vote on constitutional amendments such as the one in dispute in the instant case. Additionally, only full book members are eligible to be members of such union bodies as the negotiating committees and the trial committees, and to vote on contracts, strikes and other matters of import.

Dempster decided to propose this amendment to the membership even though the Department of Labor sent him a letter officially objecting to the three year requirement. The letter expressed the Department's opinion that the three year restrictions on the right of permit and probationary members to vote is "clearly unreasonable." At the same time, Dempster proposed another amendment calling for an increase in the quarterly dues from $30 to $50. The amendment regarding the requirements for full book status was published in *West Coast Sailor,* the union's newspaper. Dempster included statements supporting the amendment. These statements referred to the Department of Labor's disapproval of the six year requirement, but made no mention of the Department's opposition to the proposed three year requirement.

The election was conducted by mail over a two month period from April 15 to June 15, 1981. Only full book members, defined at that time as persons with six years actual sea time, were allowed to vote in the referendum.

Plaintiff, Peter Turner has been a dues paying member of SUP for 14 years. Nevertheless, he has been unable to attain full book status because he has not satisfied the six year actual sea time requirement. Accordingly, Turner was not allowed to vote in the 1981 referendum on the proposed constitutional amendment to change the requirement for attaining full book status.

Turner strongly opposed both the six year requirement and the proposed three year requirement for full book status. In order to sway the membership of the union to his position, Turner sought to notify the membership of the Department of Labor's opposition to the proposed three year requirement. Turner believed that a mailing was the only practical way to reach the members of the union.

On April 6, 1981, Turner wrote to Dempster asking to use the union membership list to do a mailing to the union membership. Turner stated that he intended to do the mailing at his own expense. Dempster responded to Turner by letter on April 14, 1981, rejecting Turner's request. Dempster's letter stated in part:

> After due consideration, your request to mail propaganda is denied. The ballot will show the proposed changes and the explanation of the reasons for the changes. No more is needed. Furthermore your request comes too late.

After receiving Dempster's letter, Turner sent each union office a copy of the statement he had hoped to distribute by mail. Turner asked that the statement be read to members present at the next union meetings. This was done only at the branch meetings in Seattle, Washington and Wilmington, Delaware. A total of 197 members were present at those two meetings. Thus, out of an electorate of 1,928, only about ten percent of the potential voters were exposed to Turner's views.

The members of SUP ratified both of the proposed constitutional amendments: the requirement for full book status was reduced from six years to three years and quarterly dues were increased from $30 to $50. Dissatisfied with the process and the result of the referendum, Turner filed this action seeking to have the election voided.

Turner seeks to have the referendum overturned on two grounds. First, Turner asserts that because the six year voter eligibility rule is unreasonable within the meaning of § 101(a)(1) of the LMRDA, 29 U.S.C. § 411, any referendum conducted pursuant to this rule is necessarily void. Second, Turner alleges that the referendum must be set aside because the union's refusal to give Turner the membership list unlawfully prevented Turner from expressing his opposition to the proposed amendments.

In addition, Turner asks the Court to rule that the modified (three year) voter eligibility requirement is unreasonable under the LMRDA. Based on this ruling, Turner seeks a ruling that the three year voter eligibility requirement is therefore void and unenforceable. Turner also requests that the Court find that the union breached its fiduciary duty under § 501 by expending union funds to publish materials supporting the proposed amendments. Finally, Turner seeks a finding that the union violated §§ 101(a)(1)(2), 411(a), and 431(c), by refusing to give Turner access to legal memoranda regarding the proposed amendments. Turner has moved for summary judgment on all of the above-stated grounds.

Defendants have filed a cross-motion for summary judgment. Defendants claim that this Court lacks subject matter jurisdiction to determine the reasonableness of the union's voter eligibility requirements and that therefore the Court is precluded from ruling on the validity of the challenged referendum. Further, defendants contend that the LMRDA does not entitle plaintiff to have his opposition materials distributed in non-candidate elections. Finally, defendants contend that plaintiff has failed to satisfy the procedural requirements of 29 U.S.C. § 501, and is therefore barred from filing a lawsuit pursuant to that section.

DISCUSSION

a. Court's subject matter jurisidiction over plaintiff's challenge to validity of voter eligibility rules.

Whether this Court has jurisdiction over plaintiff's challenge to the union's voter eligibility rules depends on whether plaintiff's complaint states a cause of action under Title I or Title IV of the LMRDA. Considerable tension exists between the two Titles, and the parties disagree about the issue of which Title plaintiff is proceeding under.

In general terms, Title I is designed to guarantee that union elections are free and fair. *Kapua v. Yamamoto,* 622 F.2d 449 (9th Cir. 1980). Title I includes safeguards for the equal voting rights of members (§ 411(a)(1)),[2] as well as members' freedom of speech and assembly (§ 411(a)(2)).[3] Title IV, on the other hand, "sets up a statutory scheme governing the election of union officers, fixing the terms during which they hold office, requiring that elections be by secret ballot, regulating the handling of campaign literature, requiring a reasonable opportunity for nomination of candidates, authorizing union to fix 'reasonable qualifications uniformly imposed' for candidates, and attempting to guarantee fair union elections in which all the members are allowed to participate." *Calhoon v. Harvey,* 379 U.S. 134, 140 (1964). The Ninth Circuit explained the substantive differences between Title I and Title IV as follows: "Title I,

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[2]The full text of 29 U.S.C. § 411(a)(1) reads as follows: "*Equal rights.*—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and by-laws."

[3]The full text of 29 U.S.C. § 411(a)(2) reads as follows: "*Freedom of speech and assembly.*—Every member of an labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates for election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

denominated a Bill of Rights, guarantees, in 29 U.S.C. § 411(a)(1), 'equal rights and privileges' to nominate and vote for candidates. Title IV, 29 U.S.C. §§ 481 *et seq.*, regulates the conduct of union elections in some detail." *Kapua*, 622 F.2d at 453.

Aside from these substantive differences, there is a considerable disparity in the enforcement mechanisms for the two Titles. Title I grants aggrieved union members direct access to the federal courts. 29 U.S.C. § 412. Title IV, conversely, provides that an aggrieved union member must complain to the Secretary of Labor. 29 U.S.C. § 482. If the Secretary finds probable cause that Title IV has been violated, the Secretary may then file suit in the appropriate federal district court.

Before reaching any of the substantive issues raised in the cross motions for summary judgment, the Court must determine whether plaintiff's complaint relating to the voting requirement states a claim under Title I or Title IV. The Supreme Court has directed that "[a]n analysis and understanding of the complaint are . . . essential to a determination of this issue." *Calhoon*, 379 U.S. at 138.

Through this lawsuit, plaintiff seeks to overturn the results of a referendum. Plaintiff argues that Title IV only applies to elections for union officers. Thus, according to plaintiff, Title IV does not grant the Secretary of Labor any authority to bring a legal action challenging the manner in which a union conducts a referendum. Under plaintiff's analysis, given that the Secretary of Labor is not empowered by Title IV to protect a union member's right to vote in a referendum, there is no protection for this right unless the union member can bring his own action in the federal courts under Title I.

Plaintiff is correct in his assertion that Title IV makes no mention whatsoever of referendums. Rather, the language of the section is strictly limited to detailed regula-

tions concerning the election of union officers. Extensive research produces no cases that hold that Title IV has any bearing on or application to union referendums. Furthermore, close analysis of the enforcement provision for Title IV, 29 U.S.C. § 482, reveals that the Secretary of Labor is only empowered to ask a court to void an election of officers. The language of § 482 suggests that Congress did not contemplate that the Secretary would raise challenges to referendums.

Given that the overall purpose of the Landrum-Griffin Act is to insure union democracy,[4] if Title IV does not provide any protection for the voting rights of union members in referendums, then some other section of the Act must supply the protection that Title IV fails to provide. The only section that can be reasonably construed to apply to the referendums is Title I, 29 U.S.C. § 411(a)(1), which grants all members of labor organizations "equal rights and privileges . . . to vote in elections and referendums." This, in fact, is the only section in the LMRDA where there is specific reference to referendums. The Court finds, therefore, that § 411(a)(1) is the section that protects union members' right to participate in referendums.[5]

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[4]See Finnegan v. Leu, 456 U.S. 431, 436 (1982) (". . . the Act's primary objective of ensuring that unions would be democratically governed and responsive to the will of their membership,"; Aquirre v. Automotive Teamsters, 633 F.2d 168, 172 (9th Cir. 1980) ("renewed concern over claims of undemocratic union organizational practices prompted Congress to pass LMRDA . . ."). See also, Note, Titles I and IV of the LMRDA: A Resolution of the Conflict of Remedies, 42 U.Chi.L.R. 166 (1974).

[5]The Court notes that a number of federal courts, including the Ninth Circuit, have applied Title I to cases involving referendums. See Aguirre v. Automotive Teamsters, 633 F.2d 168, 173 (9th Cir. 1980); Trail v. International Brotherhood of Teamsters, 542 F.2d 961 (6th Cir. 1976); Blanchard v. Johnson, 532 F.2d 1074 (6th Cir. 1976); Pawlak v. Greenawalt, 464 F.Supp. 1265 (M.D.Pa. 1979).

The matter of dues increases is addressed in 29 U.S.C. § 411 (a)(3). That section grants union members' voting rights with re-

In order to state a cause of action under Title I, a plaintiff must set forth a claim of discrimination. *Kapua*, 622 F.2d at 453. Title I only protects members' equal rights in participating in certain union activities including voting. *Id., Calhoon*, 379 U.S. 134. "In the absence of a claim of discrimination by the union against the union member, a federal district court lacks jurisdiction to award relief for an alleged violation of § 411(a)(1)." *Kapua*, F.2d at 453. Plaintiff's complaint herein does contain the requisite discrimination charge. Plaintiff alleges that the union's voter eligibility rules make an unreasonable distinction between members with more than six years actual sea time and members who have served less than six years actual sea time. The allegations respecting the difference in the voting rights accorded to these two groups constitute allegations of discrimination sufficient to make plaintiff's claim one properly cognizable under § 411(a)(1).

§ 412 grants the right to bring an action in federal district court to any person whose rights under Title I have been violated.[6] Because the Court finds that plaintiff's complaint

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spect to dues increases. In *Denov v. Chicago Federation of Musicians, Local 10-208*, 703 F.2d 1034 (7th Cir. 1983), the Seventh Circuit held that the equal rights provisions of § 411(a)(3) are the same as those contained in § 411 (a)(1). In this sense, the fact that plaintiff challenges a dues increase may establish an additional grounds for jurisdiction.

[6]Defendants argue that post-election remedies, such as those sought by plaintiff, are only available under Title IV (29 U.S.C. §§ 481 *et seq.*). The Ninth Circuit in its decision in *Kapua v. Yamamoto*, 622 F.2d 449 (9th Cir. 1980), directly controverted the defendants' argument. The Court of Appeals said that "it is difficult to reconcile a total post-election preemption by Title IV with the legislative history which, as noted above, reveals that Title I was added to the Act [after Title IV] to enlarge the rights of union members. In light of our holding that the mere existence of Title IV violations should not preclude relief under Title I, it would make little sense to permit pre-election challenges under Title I but pro-

regarding voter eligibility requirements for the 1981 referendum is properly a claim under Title I, the Court concludes that it has jurisdiction over plaintiff's claims regarding voter eligibility rules.

b. Substantive merits of plaintiff's challenge to the six-year actual sea time requirement.

Having determined that the Court has jurisdiction over plaintiff's claims, the Court must now reach the substantive merits of plaintiff's and defendants' claims.

The question is whether the union's division of voting rights violates the equal rights provision contained in Title I. Plaintiff first contends that the very fact that the union has parcelled out the right to vote in unequal allotments violates the equal rights provision.

A review of prevailing authority makes quite clear that plaintiff's argument is without merit. One of Congress' primary goals in enacting the LMRDA was to keep the Courts out of internal union affairs. *Calhoon*, 379 U.S. at 140 ("general Congressional policy [is] to allow unions great latitude in resolving their own internal controversies.") Courts have hued close to Congressional purpose by refusing to get involved in questions about the division of voting rights within unions. *Denov v. Chicago Federation of Musicians, Local 10-208*, 703 F.2d 1034 (7th Cir. 1983) (court found that Title I does not require one-member, one-vote

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hibit all post-election relief. . . . We thus conclude that the fact that balloting has already taken place does not bar the invocation of the district court's jurisdiction under Title I in that narrow class of cases in which the member can establish discrimination as required by the decision in *Calhoon v. Harvey*." *Id.* 622 F.2d at 455-56.

In view of the language of the Ninth Circuit's opinion, this Court must conclude that the Court has jurisdiction to consider post-election claims under Title I. Thus, if plaintiff has a valid claim under Title I, this Court will entertain the claim even though plaintiff seeks post-election relief.

system of representation; a system of proportional representation is permissible as long as some meaningful representation is achieved); *American Federation of Musicians v. Wittstein*, 279 U.S. 171 (1964) (Supreme Court held that system of weighted voting does not violate Title I). *See also Gordon v. Laborers International Union*, 490 F.2d 633 (10th Cir. 1973). These courts have limited the review of a union's division of the right to vote to an examination of whether the division is unreasonable or arbitrary or capricious. Barring such a finding, the courts have declined to rule on the wisdom of rules established by various unions. *See, Goldberg v. Marine Cooks and Stewards Union*, 204 F.Supp. 844, 845 (N.D.Cal. 1961). ("it is not for this tribunal to impose its concept of a proper period [for gaining voting right] upon the union."). Consequently, the Court concludes that the fact that the Sailors Union of the Pacific divided the right to vote among its members, does not in itself violate the equal rights provision of Title I.

Plaintiff's next, and far more substantial ground for challenging the 1981 referendum is that SUP's particular division of the right to vote violates the equal rights provision of Title I. Specifically, plaintiff alleges that the six year requirement is unreasonable.

As discussed above, federal courts will review the reasonableness of union rules relating to the right to vote. The Court must, however, move very carefully in this area, as it is the sound policy of the federal courts to keep involvement in internal union affairs to the absolute minimum. *Calhoon*, 379 U.S. 134.

Further, even to the limited extent that the Court is willing to examine the union's internal affairs, the Court gives great deference to the union. *Id.* In determining whether the union's voter rules are "reasonable" under Title I, the Court must take into account the interests of

the union itself, the special demands of the job, and the manner in which the demands of the job affect the union's ability to organize and represent the workers. *See Goldberg*, 204 F.Supp. at 845.

In the instant case, the Sailor's Union of the Pacific has undertaken to organize a group of workers that is particularly difficult to organize — unlicensed seagoing personnel. This is a highly unstable job, involving many individuals who move in and out of the workforce. The problems of union organization and representation are compounded by the fact that the work is completely uncentralized and that workers are sometimes out to sea and virtually unreachable for months at a time. All of these factors weigh heavily in favor of the union requiring a longer than usual service time before granting members the right to vote in all union matters.

Nevertheless, the union cannot use these facts to shield its voter eligibility rules from all judicial scrutiny. Thus, even though the Court should and does give deference to the union's choice about the appropriate length of time a member should serve before receiving full voting rights, the Court is also aware of its responsibility under Title I to ensure that the voting requirements established by SUP are not unreasonable or otherwise arbitrary and capricious.

Unfortunately, the Court cannot rely on precedent as there have been very few cases of the sort presented by these parties.

Defendants rely heavily on the decision in *Goldberg v. Marine Cooks and Stewards Union*, 204 F.Supp. 844. In *Goldberg*, the court approved a rule that required individuals serve three years of seatime before receiving the right to vote. *Id.* The Court recognized that such a long service requirement "precludes many individuals from becoming eligible to vote" but determined that "it is not for the Court

to upset such membership requirements unless it be deemed arbitrary and capricious or otherwise unreasonable." *Id.* at 845.[7]

As discussed earlier, Congress' intent in adopting the Landrum-Griffin Act was to create a statutory basis for ensuring the existence of union democracy.[8] Union democracy of the sort envisioned by Congress encompassed two complimentary concepts. On the one hand, union democracy means preventing union leaders from dictating union affairs without regard for the membership. The Supreme Court has said that the purpose of Title I was to guarantee "the independence and fair operation of the union as the representative of its membership." *Hall v. Cole,* 412 U.S. 1 (1973).

The Landrum-Griffin Act was also designed to protect the voting rights of individual union members. As the Supreme Court said in *American Federation of Musicians v. Wittstein,* 379 U.S. 171, (1964), the "pervading purpose

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[7]There is some ambiguity as to the status of the individuals involved in the *Goldberg* case. When the Court posed the question it referred to the people who were being denied the right to vote as "individuals who have certain seniority rights but are not deemed to be members of defendant union." Id. 204 F.Supp. 844. In another portion of the opinion, the Court refers to individuals that do not have the right to vote as "full-book members," suggesting that those who were denied the right to vote may be members of the union by not full-book members.

This distinction, though it may seem minor, may be very important with respect to the applicability of *Goldberg* to the instant case. If the individuals who could not vote were not union members, then the issue in *Goldberg* was the requirement for becoming a member of the union, a separate and distinct issue from that presented in the instant case. If, on the other hand, the individuals who were denied the right to vote were union members, but not full-book members, then the *Goldberg* case was identical to the instant action.

[8]See footnote 5, *supra.*

of [the Act] is that there should be full and active participation by the rank and file in the affairs of the union." *Id.* at 182-83.

Under the six-year sea time requirement, fully one-third of the members of the Sailors Union of the Pacific were not full-book members. Accordingly, one-third of the union was unable to participate in referendums on such crucial matters as constitutional amendments. Precluding such a large portion of the membership from voting on vital issues for such a long time strikes this Court as being diametrically opposed to the Congressional intent voiced in Title I of the Landrum-Griffin Act.

Thus, in view of the goals of the Act, the Court concludes that the six-year actual sea time requirement is not a reasonable regulation under 29 U.S.C. § 411(a)(1). In reaching this conclusion, the Court is mindful of the previously discussed judicial deference to the union's choices, and of the justifications for the voter eligibility rule. However, even with these weighty considerations on one side of the equation, the Court believes that it must find the six-year sea time requirement violates Title I of the LMRDA because the exclusion of such a large percentage of the membership, including some individuals like plaintiff who have served in the union for many years, is repugnant to Congressional intent as expressed in § 411(a)(1) of the Act.[9]

Accordingly, the Court has no choice but to void the referendum conducted between April and June 1982, because the referendum was conducted pursuant to voter eligibility

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[9]The fact that the Department of Labor found the six year requirement unreasonable lends further credence to the Court's decision on this question.

rules that unreasonably impinged on union members' right to vote in violation of 29 U.S.C. § 411(a)(1).[10]

The Court is well aware of the difficulties this ruling may occasion. Nevertheless, the Court believes that the result contained herein is dictated by the LMRDA. The Court also refrains from commenting on the reasonableness of the three-year actual sea time requirement proposed in the 1981 referendum. That question is not properly before the Court at this time. However, the Court does suggest that the union pay close attention to the Department of Labor's opinion on the reasonableness of any proposed votor eligibility rule.

For the reasons stated above, and for good cause appearing, the Court grants plantiff's motion for summary judgment and voids the 1981 referendum on constitutional amendments.

IT IS SO ORDERED.

DATED: August 18, 1983.

/s/ ROBERT P. AGUILAR
Robert P. Aguilar
United States District Judge

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[10]Because the Court has determined to void the 1981 referendum on the grounds stated above, the Court believes that it is neither necessary nor proper for the Court to rule on the other grounds advanced by plaintiff. Thus, the Court refrains from making any comment on the substantive merits of plaintiff's claims.

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ALEXANDER L. STEVAS,
CLERK

No. 84-1130

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

PAUL DEMPSTER and
SAILORS' UNION OF THE PACIFIC,
Petitioners,

v.

PETER TURNER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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February 4, 1985

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1130

PAUL DEMPSTER and
SAILORS' UNION OF THE PACIFIC,
Petitioners,

v.

PETER TURNER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S MEMORANDUM IN OPPOSITION

STATEMENT

Respondent Peter Turner has been a member of the petitioner Sailors' Union of the Pacific ("SUP") for more than fifteen years. However, a provision in the SUP Constitution provided that no member could vote in any union election or referendum until the member had actually served on board ship under an SUP contract for at least six years. Because of limited employment opportunities in the shipping industry, and because the collective bargaining agreements negotiated by the union grant a hiring preference to members meeting the six year rule, respondent has not yet accumulated sufficient "sea time" to acquire the right to vote on any of the many questions

which vitally affect his working conditions. Nevertheless, he is required to support the union under a union security clause and is fully subject to union discipline under the SUP Constitution.

Although respondent was willing to pay dues and accept the obligations of a union member, he believed that he could not be denied the right to vote within the union. Accordingly, he filed this action pursuant to section 101(a)(1) of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a)(1), against petitioner SUP and its president, petitioner Paul Dempster, to challenge the validity of the six-year sea-time rule. His complaint sought both to prevent the union from denying the right to vote to "permit members," as those members lacking six years of sea time are called, and to invalidate a referendum from which the permit members had been excluded and in which the union had adopted several constitutional amendments, including a 67% increase in the dues rate established by the constitution. In addition, his complaint sought an order requiring the union to refund to all members the increased dues that had been collected pursuant to the unlawful referendum.

On cross-motions for summary judgment in the district court, petitioners argued that the court lacked jurisdiction to consider a challenge to the validity of a union rule governing the right to vote, because such challenges could only be pursued by the Secretary of Labor. They also argued that, assuming the court did have jurisdiction, certain of their voting restrictions were in fact reasonable.

The district court ruled for respondent. It first concluded that it had jurisdiction under 29 U.S.C. § 412 to consider challenges to the reasonableness of union rules limiting the right to vote in union referenda. Pet. App. A13-18. Despite what the district court deemed to be its obligation to give deference to internal union rules in

order to avoid undue interference in union affairs, Pet. App. A18-19, it found that the SUP's voting restriction was unreasonable because it had the effect of excluding "fully one-third of the members . . . from voting on vital issues." Because it also found that there was no justification for such a lengthy disqualification, Pet. App. A22, it held that the rule violated section 101(a)(1) and enjoined its enforcement. Pet. App. A7. Because the rule was unlawful, the district court also set aside the referendum which had been conducted pursuant to the rule, and ordered the union to remit the improper dues increase to each of its members. Pet. App. A7-8. At respondent's suggestion, the district court also ordered the union to print the order in its newspaper, so that all union members would be aware that their rights had been vindicated. Pet. App. A8. The Court of Appeals for the Ninth Circuit affirmed in a brief opinion, which is reported at 739 F.2d 1426.

REASONS FOR DENYING THE WRIT

The Decision of the Court of Appeals Does Not Conflict With Any Decision of This Court or of Any Other Court of Appeals, and Petitioners Have Failed to Preserve Their Third Question Presented for Review in This Court.

1. Petitioners first seek review because, they contend, this Court's decision in *Calhoon v. Harvey*, 379 U.S. 134 (1964), denies the district court any jurisdiction to determine the validity of union rules governing the eligibility to vote in union referenda. The Court of Appeals squarely rejected this argument, and no other court of appeals has accepted it. In fact, there is no inconsistency with *Calhoon* and the decision below is plainly correct, principally because *Calhoon* involved only challenges to procedures for electing union officers; this case, by contrast, addresses voting in union referenda and meetings.

In *Calhoon*, members of a union sued under section 101(a)(1) of the LMRDA to invalidate two union rules:

(1) a rule that only members who have belonged to the union for at least five years were eligible to run for union office, and (2) a rule that each member could nominate only himself for union office. The Court determined that the first rule limited the right to run for union office, but that rules governing eligibility for office were governed solely by Title IV of the LMRDA. Because such rules may only be challenged by the Secretary of Labor under section 402, a union member cannot seek to litigate them under section 101(a)(1). The Court also concluded that the second rule did not deny the "equal right to nominate," which is protected by section 101(a)(1), because the rule gave each member the same right to nominate. Although, as the Court noted, the two rules taken together did prevent members who failed to satisfy the candidate eligibility rules from nominating anybody, members could not use that conjunction to evade the requirements of sections 402 and 403, which provide that members whose ultimate complaint is about a union's candidate eligibility qualifications may obtain redress only in an action filed by the Secretary of Labor.

Petitioners' argument here ignores the fundamental distinction between this case and *Calhoon*—the *Calhoon* plaintiffs challenged a union officer election, which is regulated by Title IV of the LMRDA. *Accord, Teamsters Local 82 v. Crowley*, —— U.S. —— (1984). Here, by contrast, respondent challenged a union referendum on constitutional amendments, including dues, which not only is not regulated by Title IV (which governs only those elections involving the selection of union officers), but is regulated solely by Title I. If petitioners' argument were correct, members like Turner would not merely be relegated to the procedures prescribed by Title IV for challenging elections, but would be deprived of any remedy whatsoever to challenge even the most extreme denials of the right to vote, so long as the union constitution (on which, of course, the members could not vote) so pro-

vided. Congress plainly did not intend that result. *E.g.*, *Denov v. Musicians Local 10-208*, 703 F.2d 1034, 1037 (7th Cir. 1983).

Petitioners argue, however, that the six-year sea-time rule was not "discriminatory" and that therefore *Calhoon* precludes respondent's challenge. Pet. at 8-9. Although inartfully phrased, this defense appears to be merely a repetition of petitioners' argument below that union members may only challenge a union denial of the right to vote by asserting that the union has applied its voter eligibility rules in a "discriminatory" manner—*i.e.*, in a manner other than that required by the union's rules—and that a member may never challenge a voter eligibility rule on its face, no matter how many members are excluded by the rule and how unreasonable the exclusion.

Insofar as petitioners rely on *Calhoon*, they confuse this Court's discussion of candidate eligibility rules with the voter eligibility rules at issue in this case. Indeed, petitioners' argument would render nugatory the proviso of section 101(a)(1), which grants "equal rights . . . to vote in elections or referendums . . . *subject to reasonable rules* and regulations in such organization's constitution." *Calhoon* stands for no such proposition, and although the various decisions cited at page 8 of the petition do follow *Calhoon* in forbidding Title I challenges to the reasonableness of rules governing eligibility to run for office, no reported decision adopts the argument that rules governing the eligibility to vote on dues referenda and similar matters are insulated from review for reasonableness.

2. Petitioners next seek review of the portion of the orders below that invalidated the dues increase. They do not argue that the exclusion of the one-third of the union membership who did not meet the six year sea time requirement was reasonable. Rather, they contend that because the SUP's dues increase would have been approved "by majority vote of the members" as required by section 101(a)(3) of the LMRDA, even if the permit members

had been allowed to vote, the increase cannot be set aside. The flaw in this argument is that the courts below did not rely on section 101(a)(3) to invalidate the dues increase; their decisions rest on the unlawful denial of voting rights under section 101(a)(1) and the standards for approval of a dues increase in the SUP's own constitution, and it is clear that a union dues referendum, like any other referendum, must comply with both of them. *Bunz v. Moving Picture Mach. Operators*, 567 F.2d 1117, 1120 (D.C. Cir. 1977); *Rota v. BRAC*, 64 F.R.D. 699, 702-703 (N.D. Ill. 1974). *See also Denov v. Musicians*, *supra*, 703 F.2d at 1039.

Under the SUP Constitution, a two-thirds majority is required to approve a dues increase, and as petitioners concede, Pet. at 4, if all permit members had been permitted to vote on the dues increase and had opposed the increase, the vote in favor would have been less than 60% in favor. Accordingly, the courts below properly set aside the dues increase, and petitioners could not carry the burden of proof enunciated by this Court for applying the "may have affected" rule of 29 U.S.C. § 482(c)(2), *Wirtz v. Hotel Employees Local 6*, 391 U.S. 492, 505-509 (1968), even if their argument for applying those standards to this case were correct.

Obviously, if the SUP's supermajority provision were contrary to the LMRDA, it could not be applied to bar a dues increase; but petitioners have cited no decision, and respondent is aware of no such decision, that so states. To the contrary, although section 101(a)(3) creates a minimum standard for the imposition of a dues increase, nothing in the LMRDA forbids a union to adopt a constitutional provision that requires a supermajority for passage of an increase. *See Wingate v. Teamsters Local 107*, 59 LRRM 2073 (D. Del. 1964) (in case cited by petitioners, court applied provision in union constitution requiring supermajority to defeat proposed contract). Because the SUP has chosen to adopt such a provision, it is by that standard that its referendum must be judged.

3. Petitioners' final argument for granting review is that the district court's failure to certify this case as a class action prevented the court from requiring them to refund the unlawfully collected dues to their members. Although respondent's complaint sought unionwide relief, it did not seek to proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure.[1] Yet petitioners did not complain about Turner's failure to proceed as a class action in *any* brief on the merits in either the district court or the court of appeals, even in the petitions for reconsideration or rehearing that were filed in each court. Only after rehearing was denied in the court of appeals did petitioners even hint at such an argument in a motion for stay pending certiorari, which was denied without opinion. This case thus arises in a fundamentally different posture than *Landry v. Sabine Indep. Seaman's Ass'n*, 623 F.2d 347 (5th Cir. 1980), where a similar objection was presented in a timely manner.

Had petitioners raised their class certification argument in the district court, respondent would have had the option of either meeting that contention on the merits, or seeking to amend his complaint and obtain class certification. Because petitioners chose instead to take their chances on the merits, they have deprived the Court of an airing of the arguments in the opinions of the lower courts. Accordingly, petitioners cannot obtain review on this issue. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975).[2]

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[1] Unionwide relief is frequently granted in Title I cases without any class certification, *e.g.*, *Pawlak v. Greenawalt*, 628 F.2d 826 (3d Cir. 1980); *see also Hall v. Cole*, 412 U.S. 1, 8 (1973) (by their very nature, Title I actions vindicate the collective interest of all union members in their democratic rights).

[2] We do not dispute that, as suggested by the cases cited at page 14 of the Petition, union members who lacked notice of the action could have mounted a collateral attack on the judgment had it

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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been adverse to their interests. This opportunity is not, however, available to petitioners who were parties to the action from the start and in any event are adversaries of the remaining members of the "class" whose due process rights were at stake in the cited cases. In this regard, we note that not only has each union member received written notice of the district court's actions in the union's newspaper, but petitioners have frequently discussed developments in the case in that newspaper in the course of denouncing respondent.